

14 JAN 1980

NOTE FOR: Deputy Director for Administration

FROM:

Deputy Director of Logistics

STAT

SUBJECT: Contracting with Small Disadvantaged
Business Concerns

Don:

1. In response to your request that we provide you a summary of where we are with regard to the program of aid to minority contractors, attached hereto is a paper which pretty much details the aspects of the so-called "8a Program" which gives us problems. The key document which sets forth our basic concerns with the program is the letter dated 17 May 1979 to the Acting Administrator of OFPP signed by the DDCI (Reference (b)).

2. In addition to the drive to increase the number of contracts awarded directly to minority contractors, the latest amendment to the Small Business Act placed additional emphasis on subcontracting with minority contractors. This part of the program has been receiving a lot of publicity lately because Federal agencies are having a hard time implementing its requirements.

3. Basically, only SBA has the right to enter into sole source contracts with minority contractors. Our contract information system indicates that since 1976 we have issued a total of seven contracts with three companies which certified they were owned by minorities. We are attempting to identify other firms which can be considered for award. Even if we are successful, we are still faced with a problem in awarding them a contract. We cannot justify issuing a contract on a sole source basis merely because the firm qualifies as being minority-owned. So, we are on the horns of a dilemma.

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4. We are planning on going forward with the subcontracting part of the Public Law 95-507, but we will be careful to exclude the language in the implementing clauses which provide for SBA review of the success or failure of the prime contractor's subcontracting plan.

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MEMORANDUM FOR: Deputy Director for Administration

FROM:

[REDACTED]
Deputy Director of Logistics

STAT

SUBJECT: Contracting with Small Disadvantaged
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- REFERENCES:
- (a) OFPP Policy Letter 79-1,
dated 7 March 1979
 - (b) Letter to Mr. Currie from DDCI,
dated 17 May 1979
 - (c) OFPP Policy Letter 79-3,
dated 7 Sept 1979
 - (d) Memo to DDCI from D/L,
dated 28 Sept 1979, subject:
Goal Setting
 - (e) Memorandum to Heads of Departments
and Establishments, dated
21 Nov 1979, subject: Implementation
of Public Law 95-507

1. Action Requested: The purpose of this memorandum is to advise you of the current status of the Central Intelligence Agency's position with regard to contracting with small disadvantaged business concerns.

2. Background Information:

a. On 30 July 1953, Congress passed Public Law 163, Title II of which was designated The Small Business Act of 1953. On 18 July 1958, Title II of the Act of 1953, as amended, was enacted as separate legislation which was known as the Small Business Investment Act of 1958 (Public Law 85-536). Section 8(a) of the Small Business Act provided that the Small Business

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Administration (SBA) was authorized to enter into contracts with other Federal agencies and, in turn, to subcontract with commercial concerns for actual performance of the contract requirements.

b. On 5 March 1969, Executive Order 11458 entitled "Prescribing Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise" was issued by President Nixon. As a result of this directive, the "Section 8(a) Program" was undertaken for the purpose of assisting new or struggling minority-owned business concerns to achieve a viable competitive status. An Office of Business Development was established in the Small Business Administration to manage the "8(a) Program."

c. Executive Order 11625, dated 13 October 1971, entitled "National Program for Minority Business Enterprise," gave additional impetus to the "8(a) Program" by requiring Federal departments and agencies to develop comprehensive plans and specific program goals for the minority enterprise program, with the Secretary of Commerce designated as the focal point for coordinated review and implementation of these plans and programs.

d. In 1978, Congress enacted Public Law 95-507, which included a number of changes to the Small Business Investment Act of 1958. A summary of the more important provisions is as follows:

(1) Section 211 includes a mandatory clause for inclusion in all contracts for over \$10,000, which are not for personal services, provided the contract is not with a small business. It requires compliance with a policy of favoring small businesses, and small businesses controlled by "disadvantaged" individuals in any subcontracts placed under the contract. This clause is also required in any RFP for a contract

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which may exceed \$500,000 if the contract is to be negotiated. Before award of a contract which is to be negotiated, and for more than \$500,000, and which offers "subcontracting possibilities," the contractor shall negotiate a subcontracting plan. The plan is to be part of the contract. The procuring agency must positively find the subcontract plan offers the "maximum" practicable opportunity for the small business and "disadvantaged" small business to participate. IFB's are treated similarly, except the subcontract plan is not negotiable. An inadequate plan would apparently make the low bidder ineligible for award. The plans should have "goals" (for each type of small business), the name of the subcontract administrator, a description of his duties and the efforts he will take, and assurances that the prime will pass on the requirements to lower tier contractors, will keep record of his efforts, and will submit reports to the Agency and the SBA as required by either of them. Breach of the plan is a breach of the contract.

(2) Section 221 of the Act describes a requirement to set goals for the issuance of prime contracts larger than \$10,000 to small and disadvantaged businesses. These would be jointly set by SBA and the Agency and refereed by OFPP in the event of a dispute. At year end, the Agency would report its accomplishments in meeting its quota with "appropriate justification for failure." These will be reported back to Congress. Section 221 also "establishes" in each agency an office of "Small and Disadvantaged Business Utilization," who will be appointed by the agency head, report and be responsible only to the agency head or his deputy, be responsible for implementation of all agency functions under the SBA

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Act, and would supervise all personnel whose duties "relate" to functions and duties under the SBA Act.

3. OFPP Policy Letter No. 79-1 (Reference (a)) was issued to implement certain provisions of Public Law 95-507. The Reference (b) response to OFPP's policy letter sets forth the basic reasons the Central Intelligence Agency cannot implement these portions of Public Law 95-507. Reference (c) was another policy letter from OFPP on the same subject. In Reference (d), the Director of Logistics recommended to the DDCI that we take no action with regard to the second OFPP policy letter.

4. The Reference (e) memorandum is the latest initiative from OFPP to enforce implementation of Section 211 of Public Law 95-507 which is concerned with subcontracting with small and small socially and economically disadvantaged firms under Federal prime contracts of \$500,000 or more (\$1,000,000 for construction). To date, we have not responded to this memorandum and are giving serious consideration to recommending that no response be made. We have prepared a draft procurement note that is being coordinated with procurement elements throughout the Agency which will require that the appropriate clauses be included in Agency solicitations and contracts. As the Reference (d) indicates, Public Law 95-507 is a complex and difficult law to implement. In addition to their other duties, Contracting Officers will now be charged with responsibility for determining what is an "acceptable" subcontracting plan with no substantive guidance as to what constitutes a plan which meets the requirements of the Public Law. As newspaper articles and our own communications with other Government agencies indicate, there is a notable lack of progress throughout the Federal Government in implementing the subcontracting program.

5. Summary

a. Our primary concern with the Small Business and Small Disadvantaged Business Program is the oversight responsibilities of the Department of Commerce, the Small Business Administration, the Office of Federal Procurement Policy, and the

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General Accounting Office. These organizations all have responsibilities and authorities which allow them to become deeply involved in the acquisition programs of Federal agencies.

b. The authority to enter into non-competitive procurements with small disadvantaged concerns is limited by law to the Small Business Administration under Section 8(a) of the Small Business Act (15 U.S.C. 637 (a)). The Small Business Administration funds any costs which are in excess of the estimated current fair market price anticipated under normal contracting procedures. Agencies contract directly with the SBA and not with the small disadvantaged concern, although the SBA may allow the procuring agency to negotiate the proposed subcontract schedule provisions with the 8(a) subcontractor.

c. If we implement the subcontracting provisions of Public Law 95-507, the required Defense Acquisition Regulation clauses will have to be amended to exclude any reference to the Small Business Administration as having privity to the Central Intelligence Agency's contracts.

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